ILE COPY

Office-Supreme Court, U.S.
FILED
MAY 4 1961
JAMES R. BROWNING, Clerk

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

A. L. WIRIN
257 South Spring Street
Los Angeles 12, California

JOHN R. DANCH
3212 Loma Vista Road
Ventura, California

RICHARD L. LISSNER
523 West 6th Street
Los Angeles 14, California

GERALD L. ROSEN
3424 Wilshire Boulevard
Los Angeles 5, California

Attorneys for Petitioner

INDEX

SUBJECT INDEX

		Page
I.	Introduction	1
II.	The Rigid Test Proposed by Respondent for Showing Denial of Due Process on Account of Pre-Trial Publicity Does Not Provide Reasonable Guarantees for a Fair Trial	3
III.	Other Contentions of Respondent Are Without Merit	6
Conclusion		13

Table of Authorities Cited

CASES:

People v. *Yoakum*, 53 Cal. 566	7
Powell v. *Alabama*, 287 U.S. 45	6
Stroble v. *California*, 343 U.S. 181	6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 185

AUGUSTINE BALDONADO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

I.

Introduction

The issue before this Court is whether the petitioner could have received a fair penalty trial in Ventura County in view of the conduct of the District Attorney and the resulting publicity. We have argued that the intentional dissemination of statements to the press, which were published and widely circulated in the county, constituted a calculated interference by a high law enforcement official of the State of California with the petitioner's penalty trial. In enacting the change of venue procedure set forth in its Penal Code, the State of California has provided a means by which the defense may mitigate the popular prejudice aroused by such interference. If the District Attorney's views were transmitted to his official staff only and were

not elsewhere published in Ventura County, there could be no argument that the petitioner could not receive a fair and impartial trial.

It is the interaction of the District Attorney and the press—causing or contributing to the formation of community attitudes prior to trial—which creates the prejudice.

There is a good deal of confusion implicit in respondent's assertion that "The Alleged Failure of the State to Supply a 'Corrective Process' Is Not an Issue Before This Court" (Resp. Br. p. 30). The corrective process under discussion is changing the venue of the petitioner's penalty trial. We would not be here if the State had changed the venue of this trial, for if the petitioner had been tried in a different county, the statements of the District Attorney would not have commanded the same prestige as in his own county. It may be parenthetically noted that since the trial the District Attorney has run for judicial office. Also, it is unimportant that the petitioner failed to renew his motion since such an act would have been idle.[1] It is unimportant whether the violation of due process technically consists of (a) permitting a penalty trial to be held in a prejudicial atmosphere engendered by the District Attorney's views;

---

[1] After asserting that the propriety of the trial court's ruling on venue change is not in issue before this Court, Respondent goes on to state that the trial court's ruling was without prejudice to the renewal of the motion and the motion was not renewed. The Petitioner replies that the renewal of the motion would have been an idle act because of the trial judge's remarks in denying the first motion: "It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County" (R. 77). It need scarcely be mentioned that the same trial judge who had presided over the trial of Mrs. Duncan but three weeks prior to the penalty trial of petitioner and had made the above quoted statement, would hardly have been likely to reverse himself and subsequently grant the motion.

or (b) denying a motion for change of venue based upon the same views of the District Attorney. In either case there is a denial of due process.

II.

The Rigid Test Proposed by Respondent for Showing Denial of Due Process on Account of Pre-Trial Publicity Does Not Provide Reasonable Guarantees for a Fair Trial.

Our concern with pre-trial publicity is grounded upon the notion that individuals are influenced by publicity, expressed attitudes of government officials, and the mood of their social group or unit. Such influences are often subtle and not within the conscious awareness of the individual. We wish to make it clear that we are not advocating that the problem of pre-trial publicity must necessarily be decided by social scientific literature, experiments and findings. But we do unequivocally state that these notions are beyond dispute and that an intelligent solution of the problem must be cognizant of them. The argument by the Attorney General, despite being learned in certain aspects of the law, might have been written in the early 19th century for all its apprehension of current sociological and psychological insights.

A bare bones comparison of our arguments versus those of the State may clarify what each of us is really contending. We contend that: (1) the District Attorney's statements of December 22 and December 30, 1958 were inflammatory, unintentionally made by an instrumentality of the State, and tended to prejudice any trial which might be held in Ventura County; (2) the resulting prejudicial effects may have been subtle, and that existing methods of examining prospective jurors are hardly able to discover such effects; and, (3) therefore, in view of the deliberate nature of the conduct and the consequent difficulties

in proving their effect—it is prudent and conservative to resolve the doubts in favor of the aggrieved person.

The Attorney General, apparently regarding our argument as a challenge, has taken an extreme position: (1) the general theme of the argument is to concede that the statements were prejudicial—the principal counter being that the District Attorney would have been able to make his views known at the outset of the penalty trial;[2] (2) prejudicial pre-trial publicity, no matter how aggravated cannot be the basis for error unless there is scientific demonstration that the jury was prejudiced; and (3) he has devised a rigorous formula (see Resp. Br. pp. 10, 11, especially footnote) requiring that this Court, in order to reverse, must first conclude that every person who might have read the statements would necessarily have been prejudiced by them. In fairness to the Attorney General it should be mentioned that the formula's point of departure is that all jurors in the instant case *said* they could lay aside preconceptions, or that they had no preconceptions. Apparently it makes no difference how evil the prejudicial influence might be so long as 12 people will take an oath that they have open minds, or will re-open their minds for purposes of the trial.

We submit that this position is untenable as an argument in this case and, more important, it is unacceptable as a legal principle for generic application to similar problems, for, if we correctly perceive the Attorney General's argument, mob domination, publication of false confessions or factual inaccuracies could not possibly be grounds for relief, providing 12 persons say the magic words.

Respondent does not rest after demanding that the foregoing formula disposes of the case. The brief states that

[2] But query, if he could have argued the question prior to the presentation of evidence?

even if that formula is satisfied, petitioner is still not entitled to relief because there is no showing that any juror read the offending statements. The difficulties in proof mentioned with reference to the Attorney General's "formula" are equally applicable here. One of the goals of mass media campaigns is to create an "accepting" public mood or atmosphere for an idea or product. We as individuals usually cannot pinpoint a time and place at which we first came under the dominion of a particular idea or attitude. As we previously noted, intelligent people living in the second half of the 20th century are aware of the subtlety of unconscious influence. Yet the Attorney General would throw all of this awareness out of the window and cling to a crude mechanical test.

A specific instance of the Attorney General's theory is noted where he argues that since the record contains no evidence to show that any juror acted unfairly, any conclusion that a juror did so act must necessarily be based on the premise that because of the newspaper publications, a juror could not act fairly (Resp. Br. p. 9). Apparently the inference of this argument is that unless petitioner can demonstrate the inevitability that the newspaper reports caused prejudice, he has no case. No authority is cited for such a proposition.

As noted above, we contend that the statements were prejudicial, or may well have caused prejudice, and therefore some corrective process, such as change of venue, should have been applied. The Attorney General states, "you must *demonstrate* the prejudicial effect by producing a 'biased' juror, or show that the statements must have prejudiced all jurors."

Two other areas of procedural due process are instructive, coerced confessions and denial of right to counsel.

(See *Stroble* v. *California*, 343 U.S. 181, 190; *Powell* v. *Alabama*, 287 U.S. 45.)

If the courts were to follow the Attorney General's logic in those areas, strong proof that a defendant whose confession was coerced had committed the crime would be a basis for denying relief based on coercion. And, again, in the case where a defendant is denied counsel in a capital case—clear proof of guilt would be a basis for denying relief.

We believe that an important factor in these categories of due process is to inform the State that certain forms of conducting criminal prosecutions will not be tolerated. As long as public prosecutors are free to try their cases in the press, and then confidently sit back and say, "bring me a juror whose mind has been poisoned—*and says so*," such conduct will continue.

The Attorney General reiterates this same theme several times. He says that the first question before this Court is "whether each and every person reading the newspaper articles . . . would necessarily be of such frame of mind that he could not fairly and impartially determine . . ." He then suggests that this Court should undertake a subjective test. No authority is cited for this phase of the argument. Such argument ignores modern sociology and psychology and is not supported by legal authority.

III.

Other Contentions of Respondent Are Without Merit.

A. We believe a critical aspect of this case is that the District Attorney did, in fact, make certain inflammatory statements. The fact that an officer of the court engaged in trying his case outside of the courtroom ought to be offensive to due process. The Attorney General now con-

tends that there is nothing in the record to show that the District Attorney made any statements (Resp. Br. pp. 7, 8). He insinuates that petitioner's evidence in this regard is the "rankest kind of hearsay."

In California an application for removal is decided from the affidavits and counter-affidavits presented in support of and in opposition to the application.[3] In the case at bar the petitioner's motion to remove was supported by affidavits which squarely placed in issue the prejudice alleged to have been caused by the District Attorney's published statements. Whether such statements were published—and whether they are accurate reproductions of what the District Attorney actually said—was placed in issue by the filing of counter-affidavits by the prosecution. Among other things the counter-affidavits (1) denied making a particular statement[4] (R. 10); (2) admitted making another statement (R. 9); and denied making a one-sentence remark which is part of a lengthy interview which includes many remarks and attributions (R. 16; Pet. Br., App. 8).

In our view the two most egregious instances of statements attributed to the District Attorney are contained in Appendices "A" and "B" to the brief for petitioner. These

[3] In *People* v. *Yoakum*, 53 Cal. 566 (1879), the court stated:

"It is stated in these affidavits that there exists throughout the county a general feeling that he is guilty of the murder charged in the indictment. Nor is the truth of any of these statements denied by the prosecution. No counter affidavit was offered by the State. So far as the record shows, it was not even pretended below, upon the part of the People, that the statements contained in the moving affidavits were untrue or mistaken in any respect.

"In the condition of the public mind in Kern County, as established by the affidavits on file, the prisoner could not have a fair trial of the case" (p. 570).

[4] Petitioner's brief makes no reference to and does not rely upon this statement.

appendices take the form of newspaper articles, each of which was an exhibit to petitioner's affidavit in support of removal.

Appendix "A" consists of a lengthy front page statement of the District Attorney and a lead front page newspaper article in which various remarks are attributed to the District Attorney. The District Attorney actually admits making the statement in a counter-affidavit in opposition to the motion for removal (R. 9). The District Attorney did not, by way of counter-affidavit, deny making any of the remarks attributed to him in the lead article.

Appendix "B" consists of an interview with the District Attorney. Of the 207 line columnar lines in this interview, the District Attorney does deny, by way of counter-affidavit, making the following remark: "Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case" (R. 16).

However, before the California Supreme Court the District Attorney denied making a certain statement attributed to him in the lead newspaper article contained in Appendix "A" (Rep. Tr. of Oral Argument, p. 24, lines 13-19). The District Attorney also denied that he made any statement regarding the guilt of any of the defendants (*ibid.*, p. 20, lines 3-4). There is also an equivocal denial concerning the interview set forth in Appendix "A" (*ibid.*, p. 26, lines 11-26; page 27, line 1).

We are astonished by the Attorney General's reliance on the argument that the District Attorney did not make the statements attributed to him and we supply reasons as follows:

(1) The District Attorney attempted to correct the impression that the statements attributed to him in the interview were made by him. Aeually, he admits making the

interview (*ibid.*, p. 26, line 17), but denies giving the interview in connection with petitioner's case. He says that it is simply an interview dealing generally with the desirability of retaining the death penalty. He admits, on questioning by Mr. Justice Peters that, so far as the record is concerned, this is the first denial of the interview (*ibid.*, p. 26, lines 23-26; p. 27, line 1). Mr. Justice Peters states, "I think it is highly improper to refer to matters outside the record" (*ibid.*, p. 27, lines 8-9).

(2) The District Attorney purported to explain in oral argument before the California Supreme Court why he did not deny making the statements at the time of the hearing on the motion to change venue. He says that he is more often misquoted than properly quoted (*ibid.*, p. 25, lines 5-6). He also asserts that he was not even aware that some of the petitioner's newspaper exhibits were printed (*ibid.*, lines 8-11).[5] With reference to his explanation that he did not see many of these newspapers—he *admits* that he was aware of the interview printed in Appendix "B," and he also admits making the statement attributed to him in Appendix "A." We presume that he was aware of the lead article which appeared in the same newspaper on the same page as the statement which he admits having made.

(3) Perhaps the most telling feature of the District Attorney's tardy denials is that the District Attorney filed a counter-affidavit and denied making one remark contained in the interview set forth in Appendix "B" (R. 16). If he bothered to deny the statement that co-petitioner Moya was using marijuana, we must ask why he did not deny making other statements contained in that interview, for he obviously had the opportunity to do so. It follows that, by his failure to deny the remainder of the interview he

[5] Query, why he did not seek a retraction of the alleged misquotes.

has admitted making the other remarks attributed to him in the interview.

The psychology of the District Attorney is best shown by the following statement:

> "In the first place, let me say this: that I sincerely regret that I ever said anything outside of the courtroom during the whole course of this trial; and I regret it not because I think I said anything wrong at any time, not because I think that whatever I said may have had any prejudicial effect on any prospective jurors, but simply because it has given rise to this point that is now being urged here and was urged in the trial court on motion for change of venue" (Rep. Tr. of Oral Arg., p. 24, lines 2-10).

The importance of whether the District Attorney actually made these statements was recognized by Justice Peters at the oral argument:

> "Mr. Justice Peters: Counsel, isn't it one thing for the newspapers to report the facts and circumstances and opinion about the guilt or innocence of a person, and quite another for the District Attorney, the prosecuting official in the county, to make such statements and to be quoted as to such statements?" (*ibid.*, p. 19, lines 19-24).

We submit that where a high law enforcement official makes statements which are published in the press, then the courts have a far greater latitude and power in controlling such conduct by appropriate measures than if newspapers, or other mass media, attributed statements to public officials which have not in fact been made by them. This theme is, we trust, present throughout our brief.

The Attorney General states "the District Attorney did not file an affidavit denying the making of those statements (among those attributed to him in the newspaper exhibits) which were in fact not made by him" (Resp. Br. p. 7). Apparently this statement is made to explain why the District Attorney did not file an affidavit denying that he made the statement which was published on December 30, 1958. It should be noted that the respondent's statement is carefully qualified so as to refer only to "newspaper *exhibits*." The Henson affidavit (R. 44) attributed, on information and belief, a certain statement to the District Attorney as having been published on December 27, 1958. No exhibit was attached. The District Attorney denied the making of this statement (R. 10). This denial is inconsistent with the Attorney General's present contention that whether or not the statements were in fact made by the District Attorney was not an issue in the venue proceeding, or that the proceeding was conducted on the assumption that the prosecutor's participation was not in issue. The point is that when the matter first came up in a judicial proceeding the District Attorney made a careful effort to explain and weaken the contentions made in the Henson affidavit. At such time he did not deny making the statement published on December 30. Later, in what appeared to be an off-hand manner, before the State Supreme Court, he denied making a portion of the December 30 statement. The statement or inference in Respondent's Brief that he did not deny statements which were not made by him is inaccurate and misleading.

B. In arguing that the statement of December 22 was not prejudicial to petitioner, the Attorney General says that the petitioner was not then under arrest for nor charged with the murder. While such statement is technically correct, it is misleading because the petitioner was

under arrest and was under heavy suspicion in connection with the murder.

C. The Attorney General, beginning at page 27, paints a picture of censorship. He states that if our position is accepted, a "large step in the indirect censorship of the press will have been taken." He says that officials will conceal all information from the press. He says that California will be forced to change its laws regarding publication of Grand Jury hearings. None of these things follow from the adjudication being sought here. We are not seeking the adoption of the English rule, but have limited the question to publicity engendered by the prosecutor.

Respondent suggests that many "criminals are located through news items." Again the adjudication we seek would not be detrimental to amateur sleuthing, and it should not be necessary to say that the right to freedom of thought and expression, of which the right to a free press is an aspect, flows from more fundamental strata than such activity. He also says that such an adjudication would forbid the publication of facts about the most "interesting," "significant," and "important" criminal cases in the country (Resp. Br. pp. 27, 28). We, of course, contend that the District Attorney's remarks, while "interesting" and "significant," ought not to have a social value sufficient to warrant an infringement of the right to a fair trial.

The underlying policy considerations in this case are not those involving the integrity of the press. Rather, they concern a pragmatic determination of whether a jury trial as we know it is compatible with modern methods of swaying and controlling public opinion. We have no answer to the ultimate problem of fair trial versus free press. We do, however, contend that the issue before this Court —interference by a public prosecutor—can be solved with-

out a commitment on the solution of the ultimate problem. We hesitate to mention the cliche that law cases are decided one at a time.

Conclusion

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

A. L. Wirin
John R. Danch
Richard L. Lissner
Gerald L. Rosen

Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

Nos. 185, 186 AND 187.—OCTOBER TERM, 1960.

Augustine Baldonado, Petitioner,		
185	*v.*	
State of California.		
Luis Estrada Moya, Petitioner,		On Writs of Certiorari to the Supreme Court of California.
186	*v.*	
State of California.		
Elizabeth Ann Duncan, Petitioner,		
187	*v.*	
State of California.		

[May 22, 1961.]

PER CURIAM.

After hearing oral argument and on due examination of the record, we conclude that the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petition for certiorari, and so we dismiss the writ.